COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 072438-01**

Cynthia Green	Employee
Safe Passage, Inc.	Employer
One Beacon Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan & Fabricant)

APPEARANCES
Michael P. Clancy, Esq., for the employee at hearing
James F. Dolan, Esq., for the employee on appeal
John J. Canniff, Esq., for the insurer

HORAN, J. The parties cross-appeal from a decision awarding the employee a closed period of § 34 benefits. The employee has been paraplegic since 1987. Twice in 2001, she fell from her wheelchair at work, and was injured. The insurer argues the judge failed to apply the § 1(7A) causal standard applicable to "combination" injuries, in view of the employee's pre-existing paraplegia. See G. L. c. 152, § 1(7A). The insurer also argues the judge erred by awarding the employee benefits based on her concurrent employment. We conclude recommittal is appropriate for findings on the § 1(7A) issue. If benefits are awarded following these findings, the judge should also reassess the employee's claim for a subsequent period of § 35 benefits.

The employee's injury occurred in two installments. On October 9, 2001, she scraped her left hip. She treated and lost no time from work. However, on November 26, 2001, while favoring her left hip, she injured her right side. She treated for this new injury, and continued working until March 2002, when she stopped working due to complications stemming from the injury to her right side. She underwent debridement, antibiotic treatment, and a three-month stay at a rehabilitation center. In November 2002, she had further surgery, and a further period of inpatient rehabilitation until January 2003. On April 17, 2003, the

employee returned to part-time work for the employer. By the time of hearing, she was working thirty hours per week. (Dec. 2-3.)

The insurer denied the employee's claim for benefits; the judge denied the claim at conference. (Dec. 2.) The employee appealed and underwent a § 11A impartial medical examination. The impartial physician opined the employee's disability and medical treatment were due to work-related decubitis ulcers and infections. Based on the doctor's testimony, the judge found "[t]he underlying paraplegia probably exacerbated her problem, as it put her at an increased but not high risk for these problems." (Dec. 4.) At examination time, the doctor opined the employee was no longer disabled. The doctor did not state whether the employee's slow return to work was due to her work injuries, or her pre-existing paraplegia. (Dec. 4.)

The judge concluded the employee's industrial injury caused her total incapacity until April 7, 2003, the date of the impartial physician's examination. The judge also adopted the doctor's suggestion the employee could return to her usual work on that date. (Dec. 4.) The judge awarded § 34 benefits from March 19, 2002 until April 7, 2003, based on an average weekly wage including $55.00 per week from her concurrent employer. (Dec. 2, 5.)

We agree with the insurer that the judge should have addressed the § 1(7A) "a major" causation issue. See Viera v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005)(providing, in "exquisite detail," the analysis necessary when the statute is invoked). The judge concluded that "the evidence does not persuade [him] that *the* major cause of her gradual return to work was necessitated by the work injury." (Dec. 4, emphasis added.) He therefore utilized a causation standard which exceeded the requirements of § 1(7A), assuming its application. We also agree with the employee that the opinion of the impartial physician could be read to support only a part-time work capacity upon her return to work. Accordingly, further findings are appropriate regarding the employee's incapacity status during her gradual return to full-time work, using the proper

causation standard as further determined by the judge. Therefore, to the extent the judge finds § 34 benefits due after making the requisite Viera assessment, he must then address whether the employee is entitled to § 35 partial incapacity benefits following her return to work at reduced earnings.

The insurer also contends the judge erred by applying the employee's concurrent weekly wage of $55.00 to the employee's average weekly wage, because there was no evidence the concurrent employer was an "insured" employer under G. L. c. 152, § 1(1). We disagree. At hearing, the insurer failed to object to the employee's testimony, obviously credited by the judge, which affirmatively addressed this issue. (Tr. 38-40.) We therefore consider the issue waived.

We recommit the case to the administrative judge for further findings of fact on § 1(7A), and on the extent of incapacity from April 7, 2003. (Dec. 3.) Because the employee prevails on the insurer's appeal concerning concurrent employment, employee's counsel is awarded a fee of $1,312.21 pursuant to G. L. c. 152, §13A(6).

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: September 28, 2005